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No. 89-70

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CARTER T. G. KUEHN,
Petitioner,

v.

COUNCIL NO. 65, AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of Minnesota

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BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

The opinions below, the basis for this Court's jurisdiction, and the constitutional and statutory provisions involved are correctly described in the petition for *certiorari*. Pet. 2-3.

STATEMENT OF THE CASE

a. The Minnesota Statute And Implementing Rules At Issue.

The Minnesota Public Employment Labor Relations Act permits unions representing public employees in that State to negotiate collective bargaining agreements requiring the payment by the employees the union represents who do not choose to become union members of a

"fair share fee for services rendered by the exclusive representative." Minn. Stat. § 179A.06; Pet. App. 43a. The fair share fee cannot exceed 85% of normal union dues. Subject to that 85% maximum, the fee is set in an amount equal to normal union dues less the percentage of union expenditures going for non-representational purposes. *Id. See also* Pet. App. 8a.

The statute requires that the union provide advance notice of the amount of the fee to affected employees and employers and to the Director of the Minnesota Bureau of Mediation Services. Pet. App. 43a. Minnesota Rule 5510.1410, subpart 1(D), adopted by the Bureau of Mediation Services following this Court's decision in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), specifies that the union's fair share fee notice must contain:

> sufficient information to identify expenditures for benefits available to members of the exclusive representative and sufficient information to identify expenditures for collective bargaining and contract administration services that have been provided for bargaining unit employees without regard to membership status; . . . [Pet. App. 23a.]

Once an employee has received notice of the basis for the fair share fee, the statute allows thirty days for the filing of a challenge to the fee, to be heard and decided by the Bureau of Mediation Services. Pet. App. 43a. When a challenge has been made to the calculation of a fair share fee, the statute requires that the employer hold the disputed fee in escrow until the challenge is resolved. *Id.*

b. The Administrative Proceedings In This Case.

On August 26, 1986, American Federation of State, County and Municipal Employees Council 65, the exclusive collective bargaining representative of the employees in the Crow Wing County Department of Planning and Zoning Office bargaining unit, sent a fair share fee notice to the fee payers employed in that bargaining

unit. On September 25, 1986—two weeks after fee deductions began—the petitioner filed charges with the Bureau of Mediation Services challenging, among other things, the adequacy of Council 65's notice and the amount of the fee. Pet. App. 3a & 35a. In response to those charges, on October 2, 1986, the Bureau directed the petitioner's employer to hold his fair share fee payments in escrow and not turn any of the moneys over to the Union. Pet. App. 35a. Then, on October 6, 1986, Council 65 sent the petitioner a second notice giving a fuller explanation for the basis of the fee. *Id.*

The Bureau of Mediation Services held three days of hearings on the petitioner's charges. Pet. App. 32a-33a. Following the first day of hearings, the Bureau ordered Council 65 to submit additional evidence to support the financial statements that had been introduced into evidence by the Council. Pet. App. 33a. Based on the evidence gathered at the hearings, the Bureau of Mediation Services issued a decision on December 4, 1987, sustaining the petitioner's challenge in part and denying it in part.

Applying its post-*Hudson* regulation retroactively, the Bureau found that *Council 65's August notice* was inadequate, and ordered that all fees held in escrow for the period prior to the issuance of the October notice be returned to the petitioner. Pet. App. 35a-36a. The Bureau found that *Council 65's October notice* does meet the requirements of its post-*Hudson* rule, and allowed the escrowed fees collected after the issuance of that notice to be turned over to the Council. *Id.*, at 36a. Rejecting the petitioner's argument that the fee was excessive because it included a portion of Council 65's per capita payments to the National Union and the Local Union with which Council 65 is affiliated, the Bureau found, "The organizational bodies to which per capita taxes are paid provide services to the Council in fulfilling its collective bargaining and contract administration responsibilities." *Id.*, at 36a.

The Minnesota Public Employment Relations Board considered the petitioner's appeal from the determination of the Bureau of Mediation Services, and based on the record established during the Bureau's hearings sustained the Bureau's findings. Pet. App. 30a. With respect to the adequacy of Council 65's October notice under the Bureau's post-*Hudson* regulation, the Board found that "Council 65 did fully disclose the financial information as the rule requires, ..." Pet. App. 23a. With respect to the Bureau's determination that a portion of Council 65's per capita payments to the International Union and the Local could be included in the fee, the Board concluded:

> The record demonstrates that Council 65 provided ample documentation and testimony in support of the validity of the amount of the fair share fee assessment. The Board is in agreement with Bureau that Council 65 met its burden of proof. [Pet. App. 30a.]

c. The Judicial Proceedings In This Case.

The petitioner appealed the decision of the Public Employment Relations Board to the Minnesota Court of Appeals, raising both constitutional and factual issues. Pet. App. 4a. The court of appeals considered the petitioner's constitutional challenges *de novo*. *Id.* With respect to the petitioner's challenge to the agency factual findings, the Minnesota court applied the normal Minnesota administrative law standard of review. *Id.*

The Minnesota court rejected the petitioner's constitutional challenge to the standard applied by the Bureau in determining the adequacy of Council 65's October notice, reasoning as follows:

> Minn. R. 5510.1410, subpt. 1(D) (1987) . . . details that the advance notice must contain "sufficient information to identify expenditures for collective bargaining and contract administration services." That

> rule requires a union to identify expenditures for collective bargaining and contract administration services. The rules are consistent with the *Hudson* requirement that at the very least a union should provide "adequate disclosure * * * [of] the major categories of expenses." *Hudson*, 475 U.S. at 307 n. 18. With information as to expenditures for collective bargaining and contract administration services, a nonunion employee would have sufficient information to make an informed objection to the use of his service fees if the employee desired. [Pet. App. 8a.]

The Minnesota court then went on to determine that the Bureau's finding that Council 65's notice met the applicable constitutional and statutory requirements was "adequately supported by the evidence":

> The notice included Council 65 financial information from January 1, 1985, through December 31, 1985, AFSCME International financial information expenses for the fourth quarter of 1985, and financial information for Council 65. Each of these financial information sheets listed permissible and impermissible expenses. [Pet. App. 10a.]

The Minnesota court also rejected the petitioner's argument that "he should not be required to pay fair share fees to organizations that are affiliated with his exclusive representative (Council 65) but are not actually his exclusive representative." Pet. App. 13a. That court sustained the Bureau's finding on the following grounds:

> BMS found that the organization bodies to which per capita tax payments are paid may provide services to Council 65 in fulfilling its collective bargaining and contract administration responsibilities. This finding is supported by the evidence. Based on this finding, BMS held that payments to other levels of an integrated organization may be included in the base for determining an appropriate fair share fee. PERB agreed, stating that AFSCME was an

> integrated organization and therefore could appropriately included in the calculation of fair share fees payments of other levels of its organization. Those findings are supported by the evidence. [Pet. App. 13a.]

The Minnesota Supreme Court denied the petitioner's request to review the Minnesota Court of Appeals' decision. Pet. App. 1a.

ARGUMENT

The petitioner's claim that in two respects the Minnesota rules governing the fair share fee notice that unions must provide to fee payers in that State do not meet the constitutional requirements stated in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), is insubstantial.

Thus the *certiorari* petition boils down to a request to review the determination by the Minnesota Court of Appeals that the evidence in the record provides proper support for two factual findings by the Minnesota Bureau of Mediation Services.[1] This Court, of course, does *not* sit to review such factual determinations.

This *certiorari* petition should therefore be denied.

(1) Contrary to petitioner's contention, Minnesota's post-*Hudson* notice rule is plainly in complete compliance with *Hudson's* requirement that the union give "an adequate explanation of the basis for the fee," 475 U.S. at 310. The Minnesota Bureau of Mediation Services has specified that the rule "requires a union to identify ex-

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[1] Those findings are: (i) that the October 1986 fair share fee notice sent by Council 65 to employees paying fair share fees contained sufficient information to permit the employee to make an informed challenge to the amount of the fee; and (ii) that the AFSCME International and Local Unions with which Council 65 is affiliated provide sufficient collective bargaining services to justify including a portion of the fair share fees remitted to those organizations by Council 65 in the amount charged to fair share fee payers. *See* pp. 5-6 *supra*.

penditures for collective bargaining and contract administration." Pet. App. 8a. Thus, the Minnesota rule defines the union expenses that may constitutionally be charged to fee payers—and which must therefore be identified in the union's notice to fee payers—in a way that tracks this Court's *Hudson* opinion: "The objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of a collective-bargaining activities", 475 U.S. at 302, quoting *Abood v. Detroit Board of Education*, 431 U.S. 209, 237 (1977).

(2) Petitioner's claim that it is unconstitutional for a state to permit a local union acting as an exclusive collective bargaining representative to include in the amounts chargeable to objecting fee payers any portion of the local's affiliation payments to related labor organizations is equally wrong.

"A local union [acting as an exclusive bargaining representative] may seek to affiliate with a larger organization for a variety of reasons. The larger organization may [for example] provide bargaining expertise or financial support, or may compensate for a lack of leadership within the local union." *NLRB v. Financial Institution Employees*, 475 U.S. 192, 199 n.5 (1986). These advantages to a local union from affiliation with a larger labor organization are directly related to meeting the local's collective bargaining responsibilities for which "[t]he services of lawyers, expert negotiators, economists, and a general research staff, as well as general administrative personnel, may be required." *Abood v. Detroit Board of Education, supra*, 431 U.S. at 221. It is for precisely such reasons that the overwhelming majority of local unions that act as exclusive bargaining representatives are affiliated with larger labor organizations.

That is the situation here. As the Minnesota court stated: "AFSCME [is] an integrated organization and therefore could appropriately include in the calculation of

fair share fees payments of other levels of its organization." Pet. App. 13a. Where that is true, petitioner's formalistic argument that objecting fee payers should *not* have to pay their proportionate share of the "integrated organization's" collective bargaining and contract administration expenses—but *only* the fee payer's proportionate share of such expenses directly incurred by the local union —is contrary to the governing law. As just noted, *Hudson* makes it clear that the Constitution does *not* "restrict[] the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." 475 U.S. at 302.

Indeed, in *Hudson*, the local union acting as the fee payers' exclusive bargaining representative was affiliated with, and made affiliation payments to, both a state and a national labor organization. 475 U.S. at 298. With regard to these payments, the Court stated that the notice to fee payers should either show "that none of [the payments] was used to subsidize activities for which nonmembers may not be charged, or [provide] an explanation of the share that was so used". 475 U.S. at 307 n.18. If, as petitioner claims, all such affiliation payments are *not* chargeable to objecting fee payers as a matter of law there would be no point in requiring an explanation of the use to which the payments were put.

Not surprisingly, given the foregoing, the petitioner cites no decision accepting his theory, and we know of no such decision.

3. Assuming for the moment that the point is germane to the consideration of the *certiorari* petition, *but see* p. 6, *supra*, we note that there is nothing to indicate that the court below erred in determining that there is adequate evidence to support the administrative fact findings the petitioner attacks.

Council 65's October 6, 1986 notice contained the Council's financial statement for 1985 with each major ex-

pense category broken down into a chargeable and a non-chargeable component. Pet. App. 50a. In addition, the notice contained financial statements from the affiliated AFSCME International and Local Unions showing which of their expenditures were treated as chargeable in determining the fee and which were not. Pet. App. 51a-52a. This information, as the Minnesota agencies and courts properly concluded, is plainly sufficient for a fee payer to "gauge the propriety of the union's fee," *Chicago Teachers Union v. Hudson*, *supra*, 475 U.S. at 306. *See also Gilpin v. AFSCME*, 875 F.2d 1310, 1316 (7th Cir. 1989).

Nor does petitioner provide any reason to doubt the determination of the court below that adequate evidence supports the Bureau's finding—made on an extensive record compiled during a three-day hearing—that the AFSCME International and Local Unions to which Council 65 makes affiliation payments "provide services to the Council in fulfilling its collective bargaining and contract administration responsibilities." Pet. App. 36a; *see also id.* 13a.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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